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6 UNITED STATES DISTRICT COURT  
7 WESTERN DISTRICT OF WASHINGTON  
8 AT SEATTLE

9 RIVERFRONT LANDING PHASE II  
OWNERS' ASSOCIATION,

10 Plaintiff,

11 v.

12 ASSURANCE COMPANY OF  
AMERICA,

13 Defendant/Third-Party  
14 Plaintiff,

15 v.

16 WESTERN HERITAGE INSURANCE  
COMPANY,

17 Third-Party Defendant.  
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Case No. C08-0656RSL

ORDER DENYING AS MOOT  
MOTION TO STAY DISCOVERY

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20 This matter comes before the Court on a motion filed by defendant Assurance  
21 Company of America ("defendant") to stay discovery related to plaintiff's "extra-  
22 contractual" causes of action until after the Court rules on defendant's pending motion for  
23 dismissal of those claims. Plaintiff sought to take three depositions during the week of  
24 February 17, 2009: (1) GT Framing's defense counsel Kenneth Cusack, (2) defendant's  
25 adjustor Howard Schlenker, and (3) defendant's bad faith expert David Schoeggl. The

26 ORDER DENYING AS MOOT  
MOTION TO STAY DISCOVERY - 1

1 motion was noted for consideration on Thursday, February 12, 2009, only a few business  
2 days before the depositions were scheduled to occur. After the Court's staff called  
3 defendant's counsel to learn the status of the depositions, defense counsel belatedly  
4 informed the Court that the depositions had gone forward as scheduled, rendering the  
5 motion moot.<sup>1</sup> Accordingly, this motion (Dkt. #46) is DENIED as moot.

6 One aspect of the issue still requires the Court's consideration. Plaintiff requested  
7 that the Court impose sanctions for its time spent opposing this motion pursuant to  
8 Federal Rule of Civil Procedure 37(a)(5). That rule permits the Court to award plaintiff  
9 its reasonable attorney's fees unless "the motion was substantially justified or other  
10 circumstances make an award of expenses unjust." Fed. R. Civ. P. 37(a)(5)(B). In this  
11 case, the motion was not substantially justified because counsel did not meet and confer  
12 prior to filing this motion. Defense counsel states that on February 3, 2009, he  
13 "exchanged emails and telephone calls with plaintiff's counsel Robert Hyde, who  
14 informed me that the plaintiff would not agree to any stay or continuance of extra-  
15 contractual discovery and also agreed that our communications satisfied the 'meet and  
16 confer' requirement under the rules." Declaration of Gary Sparling, (Dkt. #47) at ¶ 4.  
17 The Court will not find that the meet and confer requirement has been met simply because  
18 counsel agree. Moreover, defendant requested for the first time to postpone the  
19 depositions in an after-hours e-mail on February 2, 2009. Defendant filed this motion the  
20 next day. Neither attorney states that counsel actually spoke to each other in the interim.  
21 Furthermore, the record shows that as late as February 4, 2009, defense counsel was  
22 representing to plaintiff's counsel that the three depositions would go forward as  
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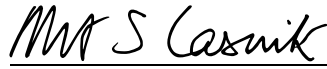
24 <sup>1</sup> In the future, if a pending motion no longer requires the Court's consideration,  
25 counsel who filed the motion should promptly inform the Court.

1 scheduled. However, later that day, defense counsel stated for the first time, by e-mail,  
2 that defendant might not make the deponents available. Declaration of Robert Hyde,  
3 (Dkt. #51) (“Hyde Decl.”) at ¶¶ 15, 16, Ex. G. There is no evidence that counsel  
4 discussed the issue by phone or in person after that point. Therefore, the meet and confer  
5 requirement was not satisfied.

6 A motion filed without first satisfying the meet and confer requirement is not  
7 substantially justified. Moreover, it appears that defendant filed the motion in part to  
8 “nudge the judge to maybe look at our [dispositive] motion a little sooner.” Hyde Decl. at  
9 ¶ 14 (explaining that defense counsel made this statement in a voicemail message).  
10 Attempting to expedite a ruling from the Court does not justify forcing plaintiff to incur  
11 the cost of opposing this late filed motion. Accordingly, the Court will award plaintiff its  
12 reasonable attorney’s fees incurred in opposing the motion. Counsel’s declaration states  
13 that he spent “at least 11.8 hours (a) coordinating the scheduling of these depositions with  
14 Mr. Sparling and my staff and (b) preparing the Association’s response to” defendant’s  
15 motion. Hyde Decl. at ¶ 18. Plaintiff is not entitled to fees for the time counsel spent  
16 scheduling the depositions because counsel would have had to schedule the depositions  
17 anyway, and those efforts are not time spent “opposing the motion.” Fed. R. Civ. P.  
18 37(a)(5)(B). Plaintiff’s counsel may file, within ten days of the date of this order, a  
19 declaration stating the amount of time spent drafting the response to the motion and the  
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1 supporting declaration.

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3 DATED this 23rd day of February, 2009.  
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7 Robert S. Lasnik  
8 United States District Judge  
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